Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977

No. .....

76-1307

NAVAJO FREIGHT LINES, INC., a corporation,

Petitioner,

vs.

VACCO INDUSTRIES, a California corporation,

Respondent.

Petition for Writ of Certiorari to the Court of Appeal, Second Appellate District, State of California.

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To the Honorable Chief Justice and Associate Justices of the United States Supreme Court:

This is an action against a common carrier on a freight claim arising from a shipment in interstate commerce.

Petitioner, Navajo Freight Lines, Inc., the defendant and appellant below, respectfully prays that a Writ of Certiorari issue to review a decision of the Court of Appeal, Second Appellate District, State of California, filed October 29, 1976. Petition for rehearing in said court was denied. Petition for hearing in the Supreme Court of California was denied on December 22, 1976.

The decision for which review is sought will be published in the official reports of California at 63 Cal.App.3d 262. There are only advance sheets present-

ly published, the bound volume not yet having been published. This decision affirmed the judgment of the Superior Court of the State of California for the County of Los Angeles originally rendered in favor of plaintiff and respondent, Vacco Industries, Inc., in the amount of $54,241.95 plus pre-judgment interest and costs, but in error cited in said opinion at page 2 thereof, as $57,241.95 plus pre-judgment interest and costs. See the Clerk's Transcript certified as a part of the record in connection with this petition, pages 20 and 21.

Opinion Below.

The opinion of the Court of Appeal, Second Appellate District, State of California, filed October 29, 1976, is printed in Appendix "A" annexed to this petition. The Order sought to be reviewed is set out in said opinion. Also printed in Appendix "A" is a copy of the Order by said court denying rehearing. A copy of the Order by the Supreme Court of California denying a hearing dated December 22, 1976, is also printed in Appendix "A".

Jurisdiction.

The statutory provision which confers jurisdiction to review the judgment or decree in question by Writ of Certiorari is found at 28 U.S.C. Sec. 1257(3). The Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. Sec. 20(11) is the statute of the United States determining the rights of the parties. This statute is made a part of the Motor Carrier Act by 49 U.S.C. Sec. 319. Some of the federal questions were initially raised in the trial court in the

responsive pleading to the complaint [C.T. pp. 6-10, line 17]. During the trial the defendant, Navajo Freight Lines, Inc., appellant here, presented its Trial Memorandum of Points and Authorities to the trial court which reviewed the federal questions involved in the trial as they were then conceived [C.T. pp. 43-66, Incl.]. The federal questions involved were next reviewed in Objections to Proposed Findings of Fact and Conclusions of Law and Proposed Judgment [C.T. pp. 115-135, Incl.]. The federal questions were next reviewed in the trial court in Defendant's Points and Authorities in Support of Motion for New Trial [C.T. pp. 143-155, Incl.]. All of the documents filed in the Court of Appeal and Supreme Court of California, which are a part of the certified record herein, reflect the federal questions involved in this matter.

Questions Presented.

(1) To what extent, if at all, does the presumption of negligence doctrine apply in an interstate motor freight common carrier case when a clear receipt for the freight on delivery is given by the consignee of an interstate shipment and thereafter, after extensive rehandling of the shipment by the consignee prior to unpacking, damage to the contents on unpacking is first discovered?

(2) In an interstate motor freight common carrier case when a clear receipt is given by the consignee to the carrier on delivery and damage to the contents is discovered after extensive rehandling by the consignee thereof, must the plaintiff rule out damage by the consignee as the result of the rehandling of the shipment after delivery?

(3) In an interstate motor freight common carrier case when a clear receipt is given by the consignee to the carrier at the time of delivery of the freight and the consignee rehandles the shipment extensively before damage to the contents is discovered on unpacking, may opinion evidence of defendant's expert given after reviewing photographs only of the appearance of the contents of one of the two crates containing damage on unpacking in which the expert concluded that the shipment was improperly packaged and that the damage resulted to the center section because of vibration as the result of said improper packaging be used by the trial Court to establish that the damage to the center section occurred before delivery to the consignee so as to invoke the application of the doctrine of presumption of negligence and impeach the evidence of good condition at the time of delivery established by the clear receipt given by the consignee for the freight at delivery?

Can such evidence be so used when the Court concludes that despite the testimony of such expert indicating no drop in transit, the Court decides to believe the opinion evidence of plaintiff's experts who concluded the damage resulted to such center section by a drop of such piece of freight at a corner thereof in transit prior to delivery even though there was no distortion of the crate consistent with a drop at such corner?

(4) In an interstate motor freight common carrier case in which a clear receipt was given on delivery of the freight to the consignee and thereafter damage to the contents was discovered only after extensive rehandling of said shipment by the consignee may

the physical evidence that damage to a crate had to have occurred at the very point at which the damage was observed by plaintiff's witness three days after delivery be overcome by general evidence that the shipment was handled with due care after delivery, when such evidence does not explain how the shipment could be handled after delivery with the damage to the container existing to the place at which damage to the crating was observed nor does it explain how the damage observed occurred to the crate containing the left hand section of the console carried?

(5) Should defendant's motion at the conclusion of plaintiff's case for nonsuit on the basis that plaintiff had not established a *prima facie* case have been granted by the court, and was the court's denial of the motion proper?

(6) Was the center section improperly packed for shipment?

(7) Does the testimony of the expert witness for defendant, Navajo Freight Lines, Inc., that the damage to the center section resulted from resonance vibration induced in the center section by normal truck operations over the road impair the effect of the clear receipt obtained by the defendant, Navajo Freight Lines, Inc., from the Naval Air Station at the time Navajo delivered the shipment?

(8) Does the showing of the assembled cabinet to Navajo's freight salesman before preparing it for shipment and showing the shipment to Navajo's freight salesman after crating it with the solid wood crates used in this case, absolve the shipper of its duty to properly prepare the items for freight shipment?

(9) In an interstate motor freight common carrier case when a clear receipt is given by the consignee to the carrier on delivery and after extensive rehandling of said shipment by the consignee the shipment is unpacked and damages to the contents of two of the four pieces of freight are discovered, must damages to the different pieces of the same shipment resulting from different causes be segregated and apportioned according to the court's conclusion of the party at fault regarding the damage to each such piece of freight?

(10) In an interstate motor freight common carrier case when a clear receipt is given on delivery of the freight and damage is discovered after extensive rehandling of said shipment by the consignee and the entire shipment is returned all the way across the United States to the point of manufacture for repair, in computing the repair charges, when the direct material costs amount to approximately $7,000.00, direct incidental costs amount to approximately an additional $5,000.00, and the direct labor costs amount to approximately another $8,000.00, may an additional burden of 200% of direct labor costs, an amount of approximately $16,000.00, be charged to bring the direct costs and burden to $32,000.00 after which a 35% general and administrative expense charge is then assessed to bring the charges to approximately $49,000.00 and then a 10% profit item be charged in addition when the common carrier is not notified at the time the shipment is received and the bill of lading contract entered into that if the shipment is damaged in transit such special damages will result?

(11) In an interstate motor freight common carrier case when the trial court concludes that the interstate

carrier is responsible for the damage and the court awards plaintiff the cost of returning the shipment to the place of manufacture:

(a) Is it proper to also charge the motor freight common carrier with the full cost of returning the repaired shipment to the consignee by van lines when the cost of delivery is approximately twice the amount the original freight carrier charged for delivery of the freight shipment originally and when the air ride suspension service offered by the van lines was an altogether different type of service than the freight service offered initially by the defendant common carrier?

(b) Was it proper to charge the carrier as an element of damage to the shipment the charges assessed by Wylie Laboratory of $500.00 to investigate the cause of the damage at destination when the shipper had already sent its engineer to the destination of the shipment to investigate and report on such causes and his report was in evidence?

(c) Was it proper for the court to have allowed a general and administrative charge of 35% and a 10% profit item to be added to the expenses incurred by plaintiff away from their own plant in fixing damages against a motor freight common carrier handling an interstate shipment of freight?

Statement of Facts.

This lawsuit was initiated by the claimant and shipper, Vacco, after the common carrier, Navajo, declined the freight loss and damage claim in writing. The claim arose after a shipment was made by Vacco from its plant in South El Monte, California, via Navajo, which was and is a motor freight common carrier in interstate commerce, of three wooden crates and one wooden

box, weighing 11,760 lbs., on September 25, 1970, to the U.S. Naval Air Station at Quonset Point, Rhode Island. This was of a one of a kind lube pump test stand of the dimensions when assembled of 6½ feet in height, 9 feet deep and 11 feet wide, which was disassembled into three sections for shipment and installation. These were two side sections, each approximately 3 feet wide, each with one side open, and a center section approximately 5 feet wide with both sides open. The remaining dimensions were the same as when the unit was assembled. Vacco's copy of the bill of lading was marked Plaintiff's Exhibit 16 and admitted into evidence [C.T. p. 235]. Navajo's copy of the bill of lading was admitted into evidence as Exhibit G [C.T. pp. 241-242]. The shipment was delivered by Navajo at the U.S. Naval Air Station at Quonset Point, Rhode Island, on October 5, 1970, and signed for without exception noted on the delivery receipt to the good condition of the three crates and one box by the U.S. Naval Air Station Receiving Clerk, William Lipscomb [C.T. p. 248]. The depositions of the said William Lipscomb and of Anthony Zangari, the delivering driver for Navajo Freight Lines, were taken in the vicinity of Quonset Point prior to the trial of this matter and were introduced at the trial as a portion of the Court Exhibit. The said Court's Exhibit is not a part of the record on appeal in support of this Petition for a Writ of Certiorari. This Court can order such exhibits forwarded by the Clerk of the Superior Court for the County of Los Angeles, Exhibit Room, Superior Court, County Courthouse, 111 No. Hill Street, Los Angeles, California, telephone number (area code 213) 974-1234 (ask for clerk of exhibit room, Superior Court, in case Number C 42419). Of the four pieces containing the shipment,

the container, called a "crate," but actually a solid wooden box, containing the center section, the bottom of which was a platform mounted on skids, weighed approximately 6000 lbs., including contents. Each of the side sections of the console was also enclosed in a solid wooden box, each of which weighed approximately 3000 lbs. including contents. The fourth solid box was small and contained parts weighing approximately 400 lbs. as packed. The shipment was loaded at the shipper's place of business on a flatbed truck in the shipper's parking lot because the shipper had no freight dock and the shipment had to be loaded from ground level. The shipper's own personnel operated the forklifts by which the shipment was loaded onto the carrier's truck. The shipment was carried from the shipper's place of business in South El Monte to the carrier's terminal in Los Angeles, at which the shipment was transferred so that the several pieces of the shipment were each loaded on a separate van trailer bound for Cleveland, Ohio, except that two of the four pieces were loaded on the same van. On arrival at Cleveland the shipment was off loaded from the several vans on which it arrived and again consolidated on the single van trailer on which the entire shipment was actually delivered at Quonset Point [C.T. pp. 248-252]. Receiving personnel employed by the Navy unloaded the shipment from the Navajo delivering van after its inspection and the signing of a clear receipt on delivery which was given to the Navajo driver by the Naval Receiving Clerk, William Lipscomb [C.T. p. 248]. Each of the crates was pulled off the incoming van by Navy personnel and equipment at the Navy unloading platform by a hook attached to a cable placed around a piece of freight, the cable being attached to a forklift truck and after the piece

of freight was dragged off the truck the Navy forklift operator put the prongs of the forklift under one side of the crate and dragged the crate inside the receiving building for storage [Court's Ex. 1, Deposition of Joseph Rega, pp. 2-7, Incl.]. Thereafter on the day that the rework facility notified the receiving building it was ready to receive the crates, the inside forklift operated by Navy personnel again dragged each of the crates out to the loading platform and then they were picked up by an outside forklift operated by Navy personnel from dock height, transported one-half mile and around a sharp corner and then delivered at the Naval rework facility, where the items ultimately were to be used, and deposited in the paved area outside the building at ground level [Court's Ex., Deposition of Joseph Rega, pp. 22 and 23]. The large crate containing the center section was left outside the building and was uncrated at that location. The other three pieces of the shipment were transported into the inside of that building. Naval personnel with crowbars pried apart the crate left outside the building containing the center section, then when the center section was uncovered, extensive damage was noted in the collapse of the top of said section where heavy accumulators not supported from below attached to the top were sagging down and came in contact with other portions of the center section below them. This unpacking of the center section was done on October 7, 1970, two days after delivery of the shipment to the Navy by Navajo, and on October 8, 1970, the damaged center section was seen by a Gerard Raymond, freight salesman for Navajo Freight Lines at Providence, Rhode Island, and Steven J. Buchanan, the design engineer for Vacco on this project who was called back to Quonset Point to view the damage and arrived

the day after its discovery. The testimony of Gerard Raymond taken by deposition at Quonset Point is also a portion of Court's Exhibit and is not a part of the record certified by the Clerk in connection with this Petition for Writ of Certiorari. Steven J. Buchanan viewed the shipment, including the crates which had not been unpacked and the crate containing the center section, which had been unpacked. Six days after he first saw the shipment, on October 14, 1970, after he returned to South El Monte, he prepared a written report which contained his version of the damage to the shipment and its causes. This report was admitted into evidence over objection [R.T. p. 121] as Plaintiff's Exhibit 4 during trial [C.T. pp. 167-169 Incl.]. On page 2 of said report, damage to the crate containing the left hand section is described by Buchanan. The crate of the unit was "completely broken away from the skid," and resting flat on the ground at the time he first saw it at destination [R.T. Vol. I, p. 100, lines 12-24 Incl. and pp. 186 and 187]. When he had last seen this crate at origin the bottom of the crate was nailed to the side edge of the skid so that the bottom of the crate was approximately six inches off the ground. At the time Mr. Buchanan saw the crate at destination the bottom of the crate had slid over the contents and over the skid and rested flat on the ground. This had to occur at the point at which this was observed since the crate could not be handled normally by forklift in this condition. The testimony of Mr. Rega was that the crate was handled by forklift by the Navy prior to its placement where it was observed by Mr. Buchanan. The crate damage observed could not have occurred when the shipment was carried by Navajo because it could not have been handled by forklift by the Navy in such

damaged condition prior to its placement at the rework facility without extraordinary measures having been taken in such handling and nc such measures are described by anyone involved in the handling of the crates.

When Mr. Buchanan was at Quonset Point on October 8, 1970, he made no inquiry to determine whether the cabinet work could be repaired on the East Coast in the vicinity of the Naval Air Station, nor did he go into the question of repairing the damage at destination [R.T. Vol. I, p. 193, line 16, to p. 195, line 4]. All the crates, including the crates for undamaged sections, were repacked by the Navy and sent back to Vacco at South El Monte for repair. There was a one-year warranty on the operation of the item which Vacco had in its original contract with the Navy [R.T. Vol. II, p. 372, line 20, to p. 373, line 24]. Vacco made a freight claim against Navajo and filed it in the amount of $76,503.43 [C.T. p. 225]. Vacco never spent the $14,000 on the Borg-Warner drive system, included as a part of its claim as estimated loss, and that item was eliminated in the judgment as awarded by the court [R.T. Vol. I, p. 285, line 10, to p. 286, line 7]. The judgment by the court included large indirect costs which were added to direct costs and direct labor. To the direct labor costs there was first added an amount equal to 200%. This was described as indirect burden and as the indirect labor costs. To the total direct costs and direct and indirect labor costs there was added a 35% general and administrative expense, which included selling expense. To the result thus obtained there was added a 10% profit item.

REASON FOR GRANTING THE WRIT.

The Supreme Court of the United States ought to grant the Petition for Writ of Certiorari in this matter and consider the questions presented for a number of reasons.

Although the liability questions involved in this case are not like the questions most frequently reviewed in transportation cases, since we have a clear receipt given the carrier on delivery followed by extensive rehandling of the shipment by the consignee prior to the unpacking of the shipment and discovery of the damage in two of the four pieces of freight, an opportunity is afforded for needed re-examination and further definition of the presumption of negligence as it applies in transportation cases.

Contrast the law as to the presumption of negligence in transportation cases as cited in *Elder and Johnson Company v. Commercial Motor Freight, Inc., of Indiana* (Court of Appeals for Montgomery County, 1953) 94 Ohio App. Rep. 358, at p. 360, with the view of the Court of Appeal in the instant case in 63 Cal.App.3d 262 in which, at page 271 of its opinion it finds that some evidence of due care in handling the shipment after delivery is enough to reasonably conclude that due care was exercised by the consignee in handling the merchandise. Evidence of handling which does not account for or explain observed damage to the shipping crate after handling by the consignee, which could not have been present at delivery by the carrier to the consignee, as compared to general evidence that the shipment was handled with due care after its receipt by the consignee is not evidence upon which the lower court could "*reasonably* conclude that due care was

exercised by the consignee in handling the merchandise."

In the matter of procedure, the right of discovery as it applies to defendant's expert witnesses prior to trial needs to be considered in the light of the defendant carrier's fundamental right not to have to proceed with any evidence until the plaintiff has established a *prima facie* case.

Important questions as they affect freight interstate carriers are presented with respect to damages. At page 274 of its opinion, the Court of Appeal stated "It seems reasonable, though, that the allocation of such costs (referring to overhead and general and administrative costs) over the direct costs of manufacturing should be gauged in the context of the established practice of the individual business, as well as the particular industry of which that business is a part." To allow a particular shipper, or a particular industry to recover large indirect burdens and to add general and administrative expense and profit elements when the carrier is not presented with notice at the time the shipment is made that damage to the shipment will involve such items in addition to actual repair costs, is a violation of the special damage rule as originally set out in *Hadley v. Baxendale,* 9 Ex. 341, 156 Eng. Rep. 145, 5 Eng. Rul. Cas. 502 (1854), as that rule has been considered in subsequent American cases. See *F. J. McCarthy, Inc. v. Southern Pacific Company* (U.S. Court of Appeals, 9th Circuit, Jan. 15, 1970) 428 F.2d 690, at page 693. Particularly, in the field of the law as it pertains to common carriers, the acknowledgment of damages on the basis of what is usual within a government contract industry, when accounting within that industry has been developed in its overhead and general and administrative expense aspects to an esoteric basis not commonly used among sellers and shippers of machinery, is to permit discrimination in favor of that industry. The National Motor Freight Classifications of machinery items are made according to use. To permit a further breakdown within a use classification as between machines in that use class manufactured or shipped by a non-government contract industry as compared to machines in that classification manufactured by a government contract industry and to permit the latter to recover damages which in both nature and amount would be classified as special damages and not collectible if recovery is sought for such damages in the non-government contract industry division would permit the carrier to discriminate among its customers according to the industry of which the shipper was a part.

The language of the Carmack Amendment, citation *supra,* is to permit the claimant to recover the full actual loss to the *property transported.* This is not or should not be regarded as the same as damages suffered by the claimant or damages resulting to the claimant's business. The carrier does not base its charges on a portion of a shipper's overhead or a portion of the shipper's general and administrative expense. The carrier is not in the business of underwriting insurance for intangible aspects of a claimant's business. It carries freight classified within a particular class by use at the same rate per unit of weight for all products being shipped within that class under the same circumstances.

To have to consider, in addition to the use made of a product, who is doing the shipping and base its charges upon distinctions among shippers, would

be to require the re-ordering of classifications of products for freight rate purposes, and result in fundamental changes in the freight rate structure for common carriers.

Conclusion.

Wherefore, a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District, should issue so that the decision of said court in the instant cause may be reviewed by the Supreme Court of the United States.

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